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No. 83-358

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND MARTORANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether prompt arrest of petitioner's agent before he could escape with the contraband precludes conviction of petitioner for possession of the controlled substance with intent to distribute.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Arellanes v. *United States*, 302 F.2d 603 6

Hamling v. *United States*, 418 U.S. 87 4

Hill v. *United States*, 379 F.2d 811 7

United States v. *Barnett*, 468 F.2d 1153 ..... 6, 7

United States v. *Batimana*, 623 F.2d 1366, cert. denied, 449 U.S. 1038 ..... 6, 7

United States v. *Giles*, 536 F.2d 136 7

United States v. *Grant*, 545 F.2d 1309, cert. denied, 429 U.S. 1103 7

United States v. *Jones*, 676 F.2d 327, cert. denied, No. 81-2227 (Oct. 4, 1982) 5, 7

United States v. *Martinez*, 588 F.2d 495 7

United States v. *Moreno*, 649 F.2d 309 ..... 4, 7

United States v. *Raper*, 676 F.2d 841 ..... 6, 7

Page

Statutes:

21 U.S.C. (1964 ed.) 174 6
21 U.S.C. (1964 ed.) 176a 6
21 U.S.C. (& Supp. V) 801 *et seq.* 6
21 U.S.C. (& Supp. V) 841 6
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A49) is reported at 709 F.2d 863. The opinion of the district court denying petitioner's post-conviction motion for a judgment of acquittal is reported at 541 F. Supp. 1226.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1983. A petition for rehearing was denied (Pet. App. A50-A51) on July 8, 1983. The petition for a writ of certiorari was filed on September 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to distribute and possess with the intent to distribute phenyl-2-propane (P-2-P), a schedule II

controlled substance, in violation of 21 U.S.C. 846, and of possession of P-2-P with intent to distribute, in violation of 21 U.S.C 841(a)(1). The district court denied petitioner's motion for a judgment of acquittal notwithstanding the verdict. Pet. App. A3-A4; 541 F. Supp. 1226 (1982). Petitioner was sentenced to consecutive terms of five years' imprisonment on each count, to be followed by a three-year term of special parole. The court of appeals affirmed (Pet. App. A1-A49) with one judge dissenting .

The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A3-A10). The facts are uncontested. The evidence showed that petitioner met with Ronald Raiton, a major supplier of P-2-P and undercover informant, on June 19, 1981, to arrange the purchase of 52 gallons of P-2-P. At the meeting Raiton agreed to sell the P-2-P to petitioner for $2,000 per gallon. Petitioner proposed that Raiton rent a van, load it with the P-2-P, and park it near Rittenhouse Square in Philadelphia, Pennsylvania. Raiton would then meet petitioner in the square and give him the keys and registration to the van. Pet. App. A-7; C.A. 40a, 43a. Petitioner would transfer the P-2-P to a second van and have it transported to Canada (C.A. App. 44a). A friend of petitioner would be in the park holding a bag that contained the $100,000 for Raiton (C.A. App. 41a-42a).

Raiton rented a van and delivered it to FBI agents who loaded it with 52 gallons of P-2-P acquired from a federal storage facility (Pet. App. A8; C.A. App. 58a, 67a-68a). On August 1, 1981, petitioner met with Raiton as scheduled. Petitioner gave Raiton a piece of paper and pencil and told him to write down the location of the van and a description. After Raiton had done so, petitioner and Raiton went to a park bench where co-defendant Frank Vadino was sitting with a shoebox. Petitioner took the box from Vadino and gave it to Raiton, saying that there was more than $100,000 inside. Petitioner gave Vadino the paper noting the location

of the van and told him to check the van while he and Raiton completed the transaction in Rittenhouse Square. Pet. App. A8-A9; C.A. App. 61a-62a.

Vadino and Marco DeTullio, another co-defendant, drove to the place where the van was parked. The van was under constant surveillance by police and FBI agents. DeTullio approached the van, but was unable to gain entrance. Pet. App. A8-A9; C.A. App. 90a-91a. Meanwhile, in Rittenhouse Square, petitioner gave Raiton an additional $4,000 and was in turn given the key to the van. Petitioner and Raiton left the park. Pet. App. A10; C.A. App. 64a-65a. Petitioner walked to where DeTullio's car was parked and handed the keychain to DeTullio (Pet. App. A10; C.A. App. 82). Driving in two separate cars, petitioner, DeTullio, and Vadino proceeded to where the van was parked. There, DeTullio took the keys and approached the van, while petitioner and Vadino drove away. C.A. App. 109a-111a.

DeTullio opened the van door with the key and entered it (Pet. App. A10). Moments later, before DeTullio could start the engine, police and FBI agents arrested him and executed a search warrant for the van (Tr. 115a). As the search was being conducted, petitioner and Vadino drove slowly by the van. Two blocks away, they conversed and then drove away at high rates of speed. They were apprehended a short time later. Pet. App. A10; Tr. 139-140.

ARGUMENT

Petitioner contends (Pet. 10-16) that the evidence was insufficient to support his conviction for possession of a controlled substance (P-2-P) with intent to distribute.[1] He argues that the government agents never surrendered dominion and control over the P-2-P, and thus that he

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[1]Petitioner does not challenge his conviction on the conspiracy charge (Pet. 5).

never obtained actual or constructive possession of it. Therefore, he contends, the evidence would support a conviction for attempting to possess — but not for possessing — the controlled substance with intent to distribute. The courts below concluded, however, that petitioner obtained constructive possession of the P-2-P through his agent, DeTullio. That fact-bound conclusion was correct and does not warrant further review by this Court. *Hamling* v. *United States*, 418 U.S. 87, 124 (1974).

1. The court's holding that petitioner obtained constructive possession of the P-2-P has two elements. First, the court found that the evidence supported a conclusion that "DeTullio was [petitioner]'s agent and subject to [petitioner]'s control" (Pet. App. A28). As the court noted, " '[p]hysical custody of narcotics by an employee or agent whom one dominates, or whose actions one can control, is sufficient to constitute constructive possession by the principal' " (*ibid.*, quoting *United States* v. *Moreno*, 649 F.2d 309, 313 (5th Cir. 1981)). DeTullio's custody of the P-2-P was therefore sufficient to establish petitioner's constructive possession. Petitioner does not appear to challenge this element of the court's holding.[2]

Second, the court found that "DeTullio exercised dominion and control over the P-2-P by virtue of his actual possession of the van in which it was contained" (Pet. App. A28). Petitioner challenges this conclusion, claiming that "the government still maintained effective and total dominion and control over the P2P" (Pet. 13).[3] However, construing the evidence in the light most favorable to the government (*Hamling*, 418 U.S. at 124), it is clear that the jury had

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[2]Petitioner does not deny that DeTullio was his agent (see Pet. App. A20), nor does he challenge the legal proposition that constructive possession can be predicated on possession by an agent.

[3]Petitioner relies heavily on the dissenting opinion on this point (Pet. 12-13; see Pet. App. A39, A44, A46).

a reasonable basis for concluding that DeTullio obtained actual possession of the P-2-P in the van. The purchase transaction between petitioner and Raiton was completed; petitioner obtained the keys to the van and transferred them to DeTullio; DeTullio unlocked the van and entered it with the intention of driving away.[4] As the court of appeals pointed out (Pet. App. A16-A17 (emphasis added)), "[t]he ultimate legal issue thus becomes whether the evidence was sufficient for the jury to find that [petitioner] had dominion and control of the P-2-P *even though DeTullio did not start the van and drive it out of its parking spot.*" We submit, with the majority below (*id.* at A35), that it "defies common sense" to contend that an accused cannot be convicted of possession merely because his agent was arrested promptly after assuming possession, before he had the opportunity to escape with the goods. The seizure of the van by government agents admittedly terminated petitioner's brief dominion and control over the P-2-P, but that does not mean he never had such dominion.[5] *United States* v. *Jones*, 676 F.2d 327, 332 (8th Cir. 1982), cert. denied, No. 81-2227 (Oct. 4, 1982). As the court of appeals observed (Pet. App. A35):

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[4]As the district court expressed it (541 F. Supp. at 1229-1230):

> Receiving a key to the van in exchange for $104,000, having that key in one's possession, and then giving that key to an associate, or agent, who enters and inspects the van with the present ability to drive it away constitutes constructive possession.

[5]Boiled down to its essentials, petitioner's claim is that the government's degree of control over the situation at the delivery site rendered it a possessor of the contraband, and that therefore petitioner's agent could not simultaneously have possessed it. But because objects may be constructively as well as actually possessed, there can be more than one possessor, in contemplation of law, at one time. Thus, even granting petitioner's premise that the chemicals were constructively possessed by the government at the time DeTullio entered the van, it is fallacious to suggest that this defeats petitioner's simultaneous culpable possession.

> This is not a case of police entrapment. [Petitioner] initiated the transaction; he devised the plan by which the transaction was executed; every act that had to be performed to complete the transaction and the crime was accomplished. To require also that the police allow the criminals to escape with the drugs would place an impossible burden on the police and on the courts seeking to enforce criminal statutes as well as contribute to the very evil that the statute is intended to eliminate.

2. Petitioner claims (Pet. 10, 12) that under the standard adopted by the Ninth Circuit, he did not obtain constructive possession of the P-2-P. See *Arellanes* v. *United States*, 302 F.2d 603, 606 (9th Cir. 1962); *United States* v. *Batimana*, 623 F.2d 1366, 1369 (9th Cir.), cert. denied, 449 U.S. 1038 (1980); *United States* v. *Barnett*, 468 F.2d 1153, 1155 (9th Cir. 1972). But as the court below recognized (Pet. App. A18), the question addressed by those cases is the relationship between the accused and the persons having actual possession of the controlled substance.[6] In *Arellanes* the accused was married to and living with the person in possession of the drugs; the court found that her presence with both her husband and the drugs was not such "a conclusively incriminating circumstance" as to establish that she had "*possession* or *control*" (302 F.2d at 606 (emphasis in original)). In *Barnett*, the issue turned on whether the accused had " 'a working relationship or a sufficient association with those having physical custody of the drugs so as to enable him to assure their production, without difficulty,

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[6]Moreover, as the court of appeals pointed out (Pet. App. A21), *Arellanes* and *Barnett* concerned interpretations of 21 U.S.C. (1964 ed.) 174 and 176a, now repealed. Petitioner was tried and convicted for violating 21 U.S.C. (& Supp. V) 841. See *United States* v. *Raper*, 676 F.2d 841, 848 (D.C. Cir. 1982) (precedent under prior 21 U.S.C. (1964 ed.) 174 not applicable to 21 U.S.C. (& Supp. V) 801 *et seq.*).

to a customer,' " as opposed to being " 'a casual facilitator of a sale' " (468 F.2d at 1155, quoting *Hill* v. *United States*, 379 F.2d 811, 814 (9th Cir. 1967)). Similarly, in *Batimana* the accused were merely lookouts and subordinates of a man who may have obtained actual possession of a supply of heroin; they were such minor figures that they were not even included in the conversation between their principal and the seller, and thus in no way exercised dominion or control over the drugs (623 F.2d at 1369).[7]

Under the theory of each of these decisions, petitioner's relationship with DeTullio would be sufficient to support a finding of constructive possession; indeed, petitioner does not appear to challenge this conclusion (see Pet. App. A20). The decisions provide no support to petitioner on the contested issue —whether prompt arrest before escape with the drugs precludes a finding of constructive possession.[8] On that issue, the decision below is in accord with that of other circuits considering similar facts. See, *e.g.*, *United States* v. *Jones*, *supra*; *United States* v. *Martinez*, 588 F.2d 495 (5th Cir. 1979); see also *United States* v. *Grant*, 545 F.2d 1309 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977); *United States* v. *Giles*, 536 F.2d 136 (6th Cir. 1976).

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[7]Petitioner's reliance (Pet. 10-11) on *United States* v. *Raper*, *supra*, and *United States* v. *Moreno*, *supra*, is also misplaced. In *Raper*, the court found constructive possession where the defendant arranged the narcotics sale and was inferentially shown to control the heroin in the custody of a co-defendant (676 F.2d at 847-848). In *Moreno*, the court found constructive possession where the accused was an integral member of a narcotics operation and directed co-defendants, who were in actual possession of the drugs (649 F.2d at 313). Petitioner concedes (Pet. 12) that the decision in *United States* v. *Jones*, *supra*, is consistent with the decision below.

[8]Thus, any conflict among the circuits on the proper formulation of the test for constructive possession need not be resolved in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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